Secretary

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Karen Zacharia
Vice President and Associate
General Counsel

1515 North Court House Road,
Suite 500
Arlington, VA 22201
(703) 351-3193 (telephone)
(703) 351-3663 (facsimile)
E-mail: Karen.Zacharia@verizon.com

July 29, 2003

William Maher, Chief
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, DC 20554

Re: Verizon Arbitrations, CC Docket Nos. 00-218, *et al.*

Dear Mr. Maher:

The purpose of this letter is to provide recent additional authority that supports Verizon's Petition for Clarification or Reconsideration of Issue I-6 (compensation for virtual NXX traffic) in this proceeding.

1. As Verizon pointed out in its Petition, the staff decision on the virtual NXX issue must be reconciled with a subsequent decision rendered by the full Commission in *Mountain Communications, Inc. v. Qwest Communications International, Inc.*, Order on Review, 17 FCC Rcd 15135 (2002) (the "*Mountain Order*"). In the *Mountain Order*, the Commission upheld charges that Qwest had imposed on an interconnecting carrier for delivery of traffic to the Mountain Communications Point of Interconnection for which Qwest ordinarily would be entitled to collect toll charges. As explained in Verizon's petition, the *Mountain Order* requires that Verizon likewise be able to charge for virtual NXX traffic in this case. The Commission's recent brief to the D.C. Circuit again makes the parallels between that case and this one apparent, and a copy of that brief is attached for inclusion in the record. Initial Brief for Respondents, *Mountain Communications, Inc. v. FCC*, No. 02-1255 (D.C. Cir. filed June 19, 2003) ("FCC Br.").

First, the Commission's brief to the D.C. Circuit again confirms that a carrier cannot alter the nature of traffic through the way that it chooses to assign numbers. FCC Br. at 25. This further supports Verizon's view that virtual NXX traffic is not subject to reciprocal compensation. Indeed, as Verizon explained in its petition, this is so because the majority of the traffic at issue here is ISP-bound traffic that unquestionably is not subject to a reciprocal compensation obligation, and because the remaining (non-ISP-bound) traffic is interexchange traffic that is delivered to a distant calling area and likewise is not subject to reciprocal compensation.[1] And the Commission's brief again makes clear that a carrier cannot change that result through the way in which it chooses to assign numbers to its customers.

[1] Of course, the present case is different from *Mountain Communications* in this respect. In that case, the traffic at issue was bound for customers of an interconnecting CMRS provider.

Second, both in the *Mountain Order* and here, an interconnecting carrier chose to configure its network and assign telephone numbers to its customers in such a way as to prevent the ILEC from collecting the toll charges that would otherwise apply to the traffic at issue and to which the ILEC is unquestionably entitled. As the Commission explained, although the calls at issue in the *Mountain Order* "pass from one calling area to another . . . in order to reach the called . . . customer," they are rated as local calls to the calling party by virtue of the receiving carrier's practice of assigning its customers telephone numbers in various rate centers. As a result, the ILEC is prevented from assessing the toll charges it would "ordinarily impose . . . on [such] calls." FCC Br. at 23. In the *Mountain Order*, the interconnecting carrier ordered DID numbers associated with various Qwest rate centers, so that Qwest customers located in those rate centers were able to place calls rated as local to those numbers. Likewise, in a Virtual NXX arrangement, the interconnecting carrier requests telephone numbers from the numbering administrator and assigns those numbers to its customers in such a way that ILEC customers can place what appear to be local calls to parties located in distant rate centers. The CLEC's assignment of the Virtual NXX number thus deprives the ILEC of the ability to impose the toll charges that would otherwise apply to what is unquestionably a toll call.

Third, under such circumstances, the *Mountain Order* and the Commission's brief make clear that the interconnecting carrier is responsible for the financial consequences of its own network architecture and number assignment choices. As the Commission explained in its brief, the interconnecting carrier is required to pay "the charges . . . attributable to [its] business decision to maintain a network arrangement – including the single [point of interconnection], but also including [the network arrangement] that incorporates wide area calling." *Id.* at 27. In both arrangements, the ILEC is providing a toll service that is equivalent to the origination of 800-number calls delivered to an interconnecting carrier for delivery to its customer. In all such cases, the interconnecting carrier must compensate the ILEC for the service that the ILEC provides. This is particularly true because the ILEC is unable to recover the costs of the service from its own customers – precisely because the CLEC's number assignment choices deprive the ILEC of the ability to do so.

Fourth, the requirement that an interconnecting carrier bear the financial consequences of such number assignment and network architecture choices does *not* affect the carrier's ability to obtain interconnection at a single point in the LATA. FCC Br. at 26 ("[T]he Order has no effect on Mountain's ability . . . to maintain its single" point of interconnection in the LATA). Rather, the use of Virtual NXX numbers is an optional arrangement that is designed to permit the ILEC's customers to make toll calls without incurring the toll charges that would otherwise apply to such calls. The interconnecting carrier could assign its customers telephone numbers in such a way that the ILEC could properly rate all such calls and impose appropriate toll charges. If the interconnecting carrier instead chooses to manipulate number assignments in order to deprive the

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As such, that traffic unquestionably was subject to a reciprocal compensation obligation when it was handed off to a CMRS provider for delivery anywhere in the same MTA. In this case, in contrast, the traffic is not subject to reciprocal compensation for the reasons identified above and in Verizon's Petition.

ILEC of the ability to impose such charges, it must be required to compensate the ILEC appropriately.

Fifth, the *Mountain Order* makes clear that it is appropriate for parties to rely on traffic studies and estimates – rather than on tracking of individual calls – to adjust intercarrier compensation payments in a manner consistent with applicable legal requirements. Thus, in the *Mountain Order*, Qwest imposed 26% of the applicable charges for interconnection facilities, based on traffic studies showing that a corresponding percentage of the traffic delivered over those facilities was transiting traffic, rather than traffic originated on Qwest's network. *Id.* at 10 (relying on Qwest calculation that 26.2 percent of the traffic on its paging interconnection facilities in Colorado was transiting traffic). Comparable traffic studies can easily be performed (and have been performed for purposes of litigation and in other contexts) to determine the percentage of traffic that is delivered to an interconnecting carrier's network that is Virtual NXX traffic. *See also Application of Pacific Bell Telephone Company (U-1001-C) for Arbitration with Pac-West Telecomm, Inc. (U5266-C) Pursuant to Section 252(b) of the Telecommunications Act of 1996*, D.03-05-031 at 4 (Cal. PUC May 8, 2003) ("Pac-West clearly knows where it terminates the traffic it receives from SBC."), *application for rehearing filed.* The concern in the staff's order that no mechanism exists for adjusting compensation to account for Virtual NXX traffic is thus unfounded.

2. In the *Pennsylvania US LEC Arbitration*, the Pennsylvania Public Utility Commission ("PUC") found – in contrast with staff's conclusion on this issue – that "calls to VNXX telephone numbers that are not in the same local calling area as the caller should not be subject to reciprocal compensation." *Petition of US LEC of Pennsylvania, Inc. for Arbitration with Verizon Pennsylvania Inc. Pursuant to Section 252(b) of the Telecommunications Act of 1996*, Opinion and Order at 58, A-310814F7000 (Apr. 18, 2003). As the PUC explained, "[a]lthough the calls that are made to VNXX telephone numbers appear to be local to the end-user caller, the location of the calling and called parties leads us to conclude that they are in the *nature* of interexchange calls that [the 1996 Act] would remove from reciprocal compensation obligations." *Id.* at 61 (emphasis in original). While the Commission declined to require US LEC to pay the originating access charges that normally apply to such interexchange calls – opting instead for a "bill-and-keep" regime – it further noted that it "believes that the intercarrier compensation for calls utilizing virtual NXX/FX codes should be based upon the end points of the call, rather than upon the NPA/NXX assigned to the calling and called parties." *Id.*

3. In the *New Jersey GNAPs Arbitration*, the Arbitrator concluded that, because virtual NXX calls "do not terminate within the same local calling area in which the call originated," such calls are "not subject to reciprocal compensation." *Petition of Global NAPs, Inc. For Arbitration Pursuant to Section 252 of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Verizon New Jersey, Inc., f/k/a Bell Atlantic*, Arbitrator's Recommended Decision at 12 (N.J. B.P.U. Mar. 7, 2003) (*the "GNAPs Recommended Decision").*[2] Instead, as Verizon has argued in this case, "parties [should] bill intercarrier compensation that is based on actual endpoints of the traffic." *Id.* at 13. Furthermore, in contrast with staff's conclusion in this proceeding that there is not a "workable" solution for identifying

[2] This decision is not yet a final decision of the New Jersey Board of Public Utilities.

virtual NXX calls, *see* 17 FCC Rcd 27039, 27182 (2002), the Arbitrator "f[ound] that traffic studies are commonly used in the industry to harmonize the law's requirement to base intercarrier compensation on actual geographic end points with the practical difficulties of doing so," and he thus concluded that "CLECs [should] cooperate with Verizon, whether through traffic studies or otherwise in developing a way for the parties to bill intercarrier compensation that is based on actual endpoints of the traffic." *GNAPs Recommended Decision* at 12-13.

4. In two recent arbitration orders, the Florida Public Service Commission confirmed that Virtual NXX traffic is not subject to reciprocal compensation because "the classification of traffic as either local or toll has historically been, and should continue to be, determined based upon the end points of a particular call." *Petition by Global NAPs, Inc. for Arbitration Pursuant to 47 U.S.C. 252(b) of Interconnection Rates, Terms and Conditions with Verizon Florida Inc.*, Order No. PSC-03-0805-FOF-TP, at 42 (July 9, 2003), *citing Investigation into Appropriate Methods to Compensate Carriers for Exchange of Traffic Subject to Section 251 of the Telecomm. Act of 1996*, Order No. PSC-02-1248-FOF-TP (Sept. 10, 2002); *Petition for Arbitration of Unresolved Issues in Negotiation of Interconnection Agreement with Verizon Florida Inc. by US LEC of Florida Inc.*, Order No. PSC-03-0762-FOF-TP, at 39-40 (June 25, 2003).

5. In its order approving Verizon's application to provide interLATA services originating in Maryland, Washington, D.C., and West Virginia, the Commission considered and rejected the argument that, because Verizon's interconnection agreements "exclud[e] payment of reciprocal compensation for virtual foreign exchange (FX) traffic," it violates the Act and Commission rules. *Application by Verizon Maryland Inc., et al., for Authorization to Provide In-Region, InterLATA Services in Maryland, Washington, D.C., and West Virginia*, WC Docket No. 02-384, Memorandum Opinion and Order ¶ 149 (rel. Mar. 19, 2003). As the Commission explained, notwithstanding staff's order on this issue, "no clear Commission precedent or rules declar[e] . . . a duty" on Verizon to pay reciprocal compensation on virtual NXX traffic. *Id.* ¶ 151.

For the Commission's convenience, I am enclosing copies of the relevant portions of each of the authorities discussed above. If you have any questions, please do not hesitate to contact me.

Yours truly,

Karen Zacharia

cc: Tamara L. Preiss
Steven F. Morris

BRIEF FOR RESPONDENTS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 02-1255

MOUNTAIN COMMUNICATIONS, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR REVIEW OF AN ORDER
OF THE FEDERAL COMMUNICATIONS COMMISSION

R. HEWITT PATE
ASSISTANT ATTORNEY GENERAL

CATHERINE G. O'SULLIVAN
NANCY C. GARRISON
ATTORNEYS

UNITED STATES
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JOHN A. ROGOVIN
GENERAL COUNSEL

JOHN E. INGLE
DEPUTY ASSOCIATE GENERAL COUNSEL

LAUREL R. BERGOLD
COUNSEL

FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554
(202) 418-1740

CERTIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties:

All parties, intervenors, and amici appearing below and in this Court are listed in the Brief of Petitioner.

B. Rulings Under Review:

Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 FCC Rcd 2091 (Enf. Bur. 2002) ("Staff Order") (J.A.), 17 FCC Rcd 15135 ("Order") (J.A.).

C. Related Cases:

This case has not previously been before this court or any other court. Counsel are not aware of any related cases currently pending before this or any other Court.

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GLOSSARY

APA	Administrative Procedure Act
CLEC(s)	competitive local exchange carrier(s)
CMRS	Commercial Mobile Radio Service
CPNP	Calling Party Network Pays
DID	direct inward dialing
IXC(s)	interexchange carrier(s)
LATA	local access and transport area
LEC(s)	local exchange carrier(s)
Mountain	Mountain Communications, Inc.
MTA(s)	major trading area(s)
POC	point of connection
Qwest	Qwest Communications International

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BRIEF FOR RESPONDENTS

STATEMENT OF ISSUES PRESENTED

The Federal Communications Commission in the complaint proceeding on review upheld certain charges that Qwest Communications International ("Qwest"), an incumbent local exchange carrier ("LEC"), had assessed upon Mountain Communications, Inc. ("Mountain"), a paging company. Mountain Communications, Inc. v. Qwest Communications International, Inc., 17 FCC Rcd 2091 (Enf. Bur. 2002) ("Staff Order") (J.A.), 17 FCC Rcd 15135 ("Order") (J.A.). The issues on review are as follows:

1. Whether the Commission reasonably determined that Qwest lawfully had charged Mountain for certain dedicated toll facilities used to deliver traffic to Mountain because those facilities were part of a wide area calling arrangement?

2. Whether the Commission reasonably determined that Qwest lawfully had charged Mountain for transporting to Mountain traffic that originates on the networks of third carriers?

STATUTES AND REGULATIONS

The pertinent statutes and regulations are reproduced in an appendix to this brief.

COUNTERSTATEMENT OF THE CASE

I. Background

"Historically, paging has been a one-way wireless radio-transmission using coded radio signals to activate a device that provides an audio, visual, or tactile indicator."[1] One-way paging services – the kind of services offered by Mountain Communications, Inc. – involve the conveyance of a message to a small portable wireless receiver, or pager, that the paging service provider furnishes to its subscriber. The subscriber carries the pocket-sized pager that is designed to alert him that someone is trying to contact him. See Pocket Phone Broadcast Service v. FCC, 538 F.2d 447, 449 (D.C. Cir. 1976).

One-way paging services can involve either local or interexchange communications. Local paging calls generally originate on the facilities of a local exchange carrier ("LEC") and are conveyed to the paging carrier for termination on the pager belonging to the paging carrier's customer. An interexchange paging call also generally originates on the facilities of a LEC, which sends the message to the facilities of an interexchange carrier ("IXC") for transmission to

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[1] Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 14 FCC Rcd 10145, 10180 (1999).

the LEC in the local serving area of the called party; that LEC in turn hands the call off to the paging carrier for termination.

At least three different "area" concepts apply to the providers of the services involved in this case. First, the Local Access and Transport Area ("LATA") is the area within which a LEC is authorized to provide local exchange telephone service or exchange access services. A LATA may be an entire state, or it may be a more limited area within a state that includes one or more local exchanges. A LEC providing service within a LATA may offer interexchange toll service within the LATA as well as flat-rated local exchange service.[2]

Second, the local service area of a LEC is the area within which the LEC provides local service without toll charges.[3] This area often is defined by a state regulatory body, and the state's definition of the local service area generally determines indirectly which calls are subject to toll charges. A LEC also may extend toll-free service to include service within several local service areas in an arrangement known as wide area service.

Third, a Major Trading Area ("MTA") is the local service area of a wireless telephone carrier, known generally as a Commercial Mobile Radio Service ('CMRS") carrier.[4] MTAs often are larger than the local service areas that apply to wireline LECs. See Staff Order, 17

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[2] See Bell Atlantic Telephone Companies v. FCC, 131 F.3d 1044, 1046 (D.C. Cir. 1997). See also 47 U.S.C. § 153(25).

[3] See AT&T Corp. v. Iowa Utilities Board, 525 U.S. 360, 370 (1999) ("AT&T Corp.").

[4] CMRS are mobile telecommunications services that are provided for profit and make interconnected service available to the public (or to such classes of eligible users as to be effectively available to a substantial portion of the public). 47 C.F.R. § 20.3(a). See Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993, 10 FCC Rcd 8844, 8844-45 (¶ 1) (1995). Paging carriers are CMRS providers.

FCC Rcd at 2092-93 n.11 (J.A.). CMRS carriers are not regulated by state commissions and are free to set their own rates without regard to MTA boundaries.

Mountain offers one-way paging services to customers in a MTA that encompasses the Colorado communities of Colorado Springs, Pueblo, and Walsenburg. Qwest, the incumbent LEC that offers local telephone service in the relevant Colorado communities, is the interconnecting LEC for Mountain's paging services and transports calls from its telephone network to Mountain's network.[5] Mountain in turn transports the calls to its subscribers' pagers.

Although Colorado Springs, Pueblo, and Walsenburg are located in the same LATA and the same MTA, they are in different LEC local service areas. Thus, any telephone call between these communities (e.g., a Colorado Springs-to-Pueblo call or a Walsenburg-to-Colorado Springs call) is a toll call under Qwest's intrastate telephone tariff.

Mountain has a single point of connection ("POC") with Qwest in the relevant MTA, which is located in Pueblo. For purposes of serving its own customers, however, Mountain assigns them direct inward dialing ("DID") numbers that are associated with Qwest switches in each of Qwest's Pueblo, Walsenburg and Colorado Springs central offices.[6] Mountain then obtains from Qwest dedicated toll facilities connecting all of these DID numbers to Mountain's single POC in Pueblo.[7] This arrangement enables Mountain to offer its subscribers in each of the communities paging numbers that can be called by LEC subscribers in that local service area

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[5] Staff Order, 17 FCC Rcd at 2091 (¶ 2) (J.A.).

[6] Mountain's subscribers in Pueblo thus have numbers that are associated with Qwest's Pueblo local service area, Mountain's Walsenburg customers have Walsenburg numbers, and its Colorado Springs customers have Colorado Springs numbers. For a definition of DID, see Staff Order, 17 FCC Rcd at 2098 n.14 (J.A.).

[7] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 4 (¶ 8) (Jan. 19, 2001) (J.A.).

without toll charges. For example, under the arrangement it obtains from Qwest, Mountain can provide a subscriber in Walsenburg with a paging number from the Walsenburg central office, even though Mountain does not have a POC in Walsenburg. As a result, calls from a LEC subscriber in Walsenburg to the Mountain subscriber (who may or may not be in Walsenburg at the time of a particular call) appear to be local calls, and the party calling the pager incurs no toll charges, even though Qwest delivers the call to Mountain outside the Walsenburg service area. In the absence of the dedicated toll facilities connecting the three communities to make up a wide-area service arrangement, persons in Walsenburg calling the Mountain pager ordinarily would be charged for a toll call because Mountain has no POC in Walsenburg and the call would have to be transported from one LEC service area (Walsenburg) to another (Pueblo).[8] Qwest bills the paging carrier a flat monthly rate for the dedicated facilities across its toll network.[9]

A. Statutory and Regulatory Background

The Communications Act of 1934 ("1934 Act") gives the Commission responsibility to adjudicate private disputes concerning the lawfulness of a common carrier's actions. 47 U.S.C. §§ 206-209. Section 208(a) allows any person "complaining of anything done or omitted to be done by any common carrier subject to this [1934 Act], in contravention of the provisions thereof," to file a complaint with the Commission. 47 U.S.C. § 208(a). The Commission has a duty to rule upon the issues raised by the complainant, American Telephone & Telegraph Co. v. FCC, 978 F.2d 727, 732 (D.C. Cir. 1992), cert. denied, 509 U.S. 913 (1993), but it has discretion to investigate the complaint "in such manner and by such means as it shall deem proper," 47

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[8] See Answer, Exh. 1 (Declaration of Vicki Boone) at 4 (J.A.).

[9] Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 4 (¶ 7) (J.A.).

U.S.C. § 208(a). The complainant bears the burden of proving that the carrier violated the Act or regulations implementing the Act.[10] The Commission has authority to award monetary damages to the complainant. 47 U.S.C. § 209.

Section 332 – a provision of the Act specifically pertaining to mobile services – directs the Commission, upon receipt of a reasonable request from a CMRS provider, to order a common carrier to establish physical connection with that CMRS provider pursuant to section 201(a). 47 U.S.C. § 332(c)(1)(B). Section 201(a) authorizes the Commission to require a common carrier "to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes." 47 U.S.C. § 201(a). The Commission's authority with respect to mobile services under section 332 applies to both interstate and intrastate interconnections.[11]

Section 251(b)(5), added to the Communications Act as part of the Telecommunications Act of 1996,[12] requires LECs to "establish reciprocal compensation arrangements for the

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[10] E.g., High-Tech Furnace Systems v. FCC, 224 F.3d 781, 787 (2000); American Message Centers v. FCC, 50 F.3d 35, 41 (D.C. Cir. 1995).

[11] Although section 2(b) of the 1934 Act generally denied the Commission jurisdiction over intrastate communications, see Louisiana PSC v. FCC, 426 U.S. 355 (1986), Congress made an exception to that jurisdictional limitation for matters regulated under section 332. See 47 U.S.C. § 152(b). See also AT&T Corp. v. Iowa Utilities Bd., 525 U.S. at n.8 (1996 amendments to 1934 Act extended FCC authority over local competition and thus lessened the practical effect of section 2(b) as a limitation on FCC jurisdiction).

[12] Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

transport and termination of telecommunications."[13] 47 U.S.C. § 251(b)(5).[14] In the rulemaking proceeding that implemented this statute, the Commission determined that section 251(b)(5) applied to interconnections between LECs and CMRS providers, "including one-way paging providers, for the transport and termination of traffic on each other's networks."[15] The Commission held further that section 251(b)(5) applies only to local telecommunications traffic, i.e., traffic that originates and terminates within the MTA, and not to long-distance or toll interstate traffic.[16] The Commission in that proceeding also adopted section 51.703(b), a regulation that states that a "LEC may not assess charges on any other telecommunications carrier for local telecommunications traffic that originates on the LEC's network." 47 C.F.R. § 51.703(b). This regulation addressed a common practice under which LECs had charged paging carriers for the privilege of terminating calls that originated with LEC subscribers.

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[13] The term "telecommunications" as defined in the 1996 Act is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

[14] Under reciprocal compensation arrangements, "when a customer of LEC A calls a customer of LEC B, LEC A must pay LEC B for completing the call." Bell Atlantic Telephone Companies, 206 F.3d 1, 4 (D.C. Cir. 2000). See also Global Naps, Inc. v. FCC, 247 F.3d 252, 254 (D.C. Cir. 2001).

[15] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499, 15997 (¶ 1008) (1996) ("Local Competition Order"), vacated in part, affirmed in part, Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), rev'd in part, affirmed in part, AT&T Corp., 525 U.S. 360.

[16] Local Competition Order, 11 FCC Rcd at 16013 (¶ 1034). See also Global Naps, Inc. v. FCC, 247 F.3d at 254; Bell Atlantic Telephone Companies v. FCC, 206 F.3d at 2. The Commission determined that "traffic between an incumbent LEC and a CMRS network that originates and terminates within the same MTA (defined based on the parties' locations at the beginning of the call) is subject to transport and termination rates under section 251(b)(5)." Local Competition Order, 11 FCC Rcd at 16016 (¶ 1043). The Commission changed its definition of what is covered by section 251(b)(5) in its ISP Remand Order, 16 Rcd 9151 (2001), but made clear in that order the change had no impact on CMRS traffic, id., 16 FCC Rcd at 9173 (¶ 47). This Court set aside the ISP Remand Order on review. Worldcom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002).

B. TSR Wireless Order

In TSR Wireless, LLC v. U S West Communications, Inc., 15 FCC Rcd 11166 (2000) ("TSR Wireless"), aff'd, Qwest Corp. v. FCC, 252 F.3d 462 (D.C. Cir. 2001) ("Qwest Corp."), the Commission granted in part and denied in part the complaints of five paging carriers alleging inter alia that certain LECs had charged them for facilities that were used in the delivery of LEC-originated traffic to paging carriers, in violation of section 51.703(b). The Commission in that order reaffirmed the applicability of the reciprocal compensation requirements of section 251(b)(5) to local calls that are delivered to one-way paging carriers. 15 FCC Rcd at 11176-78 (¶¶ 18-21). Because reciprocal compensation governed the payment obligation for such calls, LECs could not charge paging carriers for the local traffic the LECs handed off to them. The Commission also held that LECs could not circumvent the requirement in section 51.703(b) by "redesignating . . . 'traffic' charges as 'facilities' charges." 15 FCC Rcd at 11181 (¶ 25).

The Commission made clear in that order, however, that section 51.703(b) does not bar LECs in all circumstances from imposing charges on a paging carrier in connection with traffic that terminates on a paging carrier's network. See Qwest Corp. v. FCC, 252 F.3d at 468 (paging carrier must pay for facilities in some circumstances). First, the Commission stated that LECs lawfully could charge paging carriers for transiting traffic, i.e., "traffic that originates from a carrier other than the interconnecting LEC but nonetheless is carried over the LEC network to

the paging carrier's network." TSR Wireless, 15 FCC Rcd at 11177 n.70.[17] See Qwest Corp., 252 F.3d at 468.

Second, the Commission determined that section 51.703(b) does not prohibit LECs from charging paging carriers for facilities used to permit wide area calling "or similar services." 15 FCC Rcd at 11166, 11184 (¶¶ 1, 30). The Commission pointed out that such services "are not necessary for interconnection or for the provision of [a paging carrier's] service to its customers." 15 FCC Rcd at 11184 (¶ 30). Wide area calling services instead permit a paging carrier to "'buy down' the cost of . . . toll calls to make it appear to end users that they have made a local call rather than a toll call." 15 FCC Rcd at 11184 (¶ 30). This is advantageous to the paging carrier because it allows more calls to paging subscribers to be considered local (non-toll) and thus to make the paging service more useful to those subscribers. Because LECs are under no obligation "to provide such services at all," the Commission found that "it would seem incongruous for LECs who choose to offer these services not to be able to charge for them." 15 FCC Rcd at 11184 (¶ 30).

C. Qwest-Mountain Arrangements

On July 24, 2000, Qwest informed Mountain and other paging companies by letter that it was revising its billing policies in order to comply with TSR Wireless.[18] Qwest specified that it

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[17] In the damages phase of that proceeding, the Commission reiterated that TSR Wireless "unambiguously permitted LECs to charge paging carriers for 'transiting traffic.'" Metrocall v. Southwestern Bell Telephone Co., 16 FCC Rcd 18123, 181226 (¶ 8) (2001) ("Metrocall Order"), recon. denied, 17 FCC Rcd 4781 (2002) ("Metrocall Reconsideration"). On the basis of that holding, the Commission determined that the complainant in TSR Wireless was not entitled to damages because the amount the complainant owed the LEC for transiting charges exceeded the unlawful facilities charges that the complainants had paid.

was "eliminating charges for the portion of local interconnection facilities used to deliver traffic that originates on Qwest's network and terminates on [the paging company's] network."[19] As a result, Qwest "would no longer bill paging companies for any interconnection facilities charges except transit charges."[20] On the basis of its calculation that 26.2 percent of the traffic on its paging interconnection facilities in Colorado was transiting traffic, Qwest stated that it would reduce Mountain's facilities charges beginning in August 2000 by 73.8 percent.[21]

Qwest stated that it would continue to assess tariffed charges for facilities and services that are not essential for interconnection, including wide area calling services and non-recurring charges for DID numbers.[22] Qwest pointed out that the Commission in TSR Wireless had recognized that a LEC is entitled to charge its own end users for toll calls that are delivered at no charge to paging companies. Qwest stated that it would charge paging companies who elect to "'buy down' the cost of such toll calls to make it appear to the ILEC's end users that they have made a local call rather than a toll call," as permitted by TSR Wireless.[23]

Qwest offered the paging companies several configuration and billing options. At the request of a paging carrier, Qwest offered to reconfigure a paging carrier's foreign exchange,

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[18] Letter by Vickie Boone, Qwest Corp. (July 24, 2000), *attached to* Mountain Communications Complaint, Exh. XXIII ("Qwest July 2000 Letter") (J.A.); Joint Statement of Mountain Communications And Qwest Corporation (Oct. 18, 2000) at 8 (¶ 22) ("Stipulated Facts") (J.A.); "Answer and Affirmative Defenses of Qwest Corp." (Oct. 2, 2000) at 17 ("Answer") (J.A.).

[19] Qwest July 2000 Letter at 1 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

[20] Qwest July 2000 Letter at 1 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

[21] Stipulated Facts at 8 (¶ 22) (J.A.).

[22] Qwest July 2000 Letter at 1-2 (J.A.); Stipulated Facts at 8 (¶ 22) (J.A.).

[23] Qwest July 2000 Letter at 2, quoting TSR Wireless, 15 FCC Rcd at 11184 (¶ 30) (J.A.)

wide area calling, reverse billing or 800 number arrangements in a way that allows Qwest to collect toll charges from its own end user customers. Under that option, Qwest would deliver "its traffic to [the paging carrier's] network at no charge"[24] and would charge paging carriers for transiting traffic only.

For Mountain, such a reconfiguration would result in Qwest's free delivery of all calls originated by Qwest's end users within the MTA directly to Mountain's point of connection in Pueblo. Mountain would obtain Pueblo DID numbers from Qwest for all its subscribers (including those who were not located in Pueblo), and Qwest would assess toll charges for any interexchange intraLATA calls made by Qwest's subscribers to Mountain's subscribers. Under this approach, a Qwest subscriber outside the Pueblo service area who called a Mountain subscriber would have to pay toll charges to Qwest, even though the Mountain subscriber might be physically located in the same service area as the calling party. For example, Qwest would assess toll charges on its subscriber in the Colorado Springs local service area who called a Mountain subscriber also physically located in Colorado Springs, because the Mountain subscriber had a Pueblo DID paging number.[25]

Alternatively, if the paging carrier chose to retain arrangements that permitted Qwest's end user customers to avoid such toll charges when calling the pager's subscriber, Qwest said that the paging carrier would have to pay Qwest at the "appropriate tariff or contract rates for

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[24] Qwest July 2000 Letter at 3 (J.A.).

[25] See Qwest Corporation's Brief on the Disputed Material Issues, Exh. 1 (Second Supplemental Declaration of Sheryl R. Fraser) at 1-2 (¶ 3) (J.A.). If Mountain establishes a POC in Walsenburg and Colorado Springs, Qwest stated that "[e]ach of these POCs and the delivery of all local calls to these POCs by Qwest would be free to the paging carrier." Id. at 2 (¶ 4) (J.A.).